

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHARLES WIRTH,

Case No. 2:17-cv-00027-RFB-VCF

Petitioner,

ORDER

v.

ROBERT LEGRAND,¹ et al.,

Respondents.

Petitioner Charles Wirth, who entered an Alford² plea to two counts of open or gross lewdness and one count of attempted sexual assault, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (See ECF Nos. 11; 20-6.) This matter is before this court for adjudication of the merits of the remaining grounds³ in Wirth's petition, which allege that the state district court erred in denying his motion to withdraw his guilty plea, there were issues regarding the probable cause determination made by the justice court, and his counsel failed to make him aware of the lifetime supervision consequence of his plea, to retain an investigator, to hire an expert, and to move to

¹ The inmate locator page on the state corrections department's website indicates Wirth is on parole. Should there be any further proceedings in this federal matter, the parties should substitute a proper current respondent in the place of Robert LeGrand. The 1976 Advisory Committee Notes to Subdivision (b) of Rule 2 of the Rules Governing Section 2254 Cases suggest the proper respondent for a petitioner who is on parole is "the particular . . . parole officer responsible for supervising the applicant, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate."

² See North Carolina v. Alford, 400 U.S. 25, 37–38 (1970) (holding that a defendant can enter a valid guilty plea while still maintaining his innocence where there is a factual basis for the plea and the plea is voluntary, knowing, and intelligent).

³ This court previously dismissed grounds 4, 6, 7, 8, 9, 10 11, 12, 13, 14, and 15. (See ECF Nos. 44; 68.)

1 suppress the victim's diary. (ECF Nos. 11; 11-1.) For the reasons discussed below, this court denies
 2 the petition and a certificate of appealability.

3 **I. BACKGROUND**

4 S.P.,⁴ Wirth's stepdaughter who was twelve years old at the time of the preliminary hearing
 5 in 2008, testified that in January 2007 Wirth "pulled down [her] underwear and he spit on [her]
 6 private area and started rubbing his penis on [her] private area." (ECF No. 18-12 at 11–13, 16, 19.)
 7 S.P. also testified that around Christmas 2006, Wirth "pinned [her] to a table and stuck his hand
 8 up [her] skirt and into [her] underwear." (Id. at 21.) And on another occasion around that same
 9 time, she woke up after falling asleep watching a movie "and [Wirth] was on top of [her] on his
 10 hands and knees, and was moving back and forth with his penis inside [her] vagina." (Id. at 22.)
 11 S.P. told Wirth to get off her, and after he stood up, semen "squirted on [her] shirt and on [her]
 12 face." (Id. at 23.) And in the summer of 2006, S.P. testified that she was in a pool with Wirth, and
 13 he first touched her "inside [her] bathing suit bottom" and then "pushe[d her] under the water and
 14 [stuck] his penis inside [her] mouth." (Id. at 24, 26.) S.P. testified that Wirth's abuse lasted "about
 15 four to six years" and "was almost a nightly thing after [her] mom went to bed." (Id. at 27, 41.)

16 On July 15, 2008, the State charged Wirth with two counts of sexual assault, attempted
 17 sexual assault, and four counts of lewdness with a child under the age of fourteen. (ECF No. 18-
 18 14.) On August 5, 2008, Wirth pleaded not guilty to the charges, and a trial date was set. (ECF No.
 19 18-18.) After jury selection began, Wirth and the State reached an agreement, and the State filed
 20 an amended information charging Wirth with open or gross lewdness, open or gross lewdness

21
 22 ⁴ The Local Rules of Practice state that "[p]arties must refrain from including—or must partially
 23 redact, where inclusion is necessary—[certain] personal-data identifiers from all documents filed
 with the court, including exhibits, whether filed electronically or in paper, unless the court orders
 otherwise." LR IA 6-1(a). This includes the names of minor children, so only a child's initials
 should be used. Id.

1 second offense, and attempted sexual assault. (ECF No. 19-26.) Wirth entered a guilty plea
 2 pursuant to Alford. (ECF No. 19-27.)

3 Prior to sentencing, Wirth obtained new counsel and moved to withdraw his guilty plea.
 4 (ECF No. 19-31.) The state district court denied the request. (ECF No. 20-3 at 35.) Wirth was
 5 sentenced to 12 months for the open or gross lewdness conviction, 19 to 48 months for the open
 6 or gross lewdness second offense conviction, and 96 to 240 months for the attempted sexual assault
 7 conviction. (ECF No. 20-6.) Wirth was also sentenced to lifetime supervision and was ordered to
 8 register as a sex offender. (Id.) Wirth appealed, and the Nevada Supreme Court affirmed. (ECF
 9 No. 20-18.) Wirth also filed a state post-conviction petition, which was denied by the state district
 10 court and affirmed on appeal by the Nevada Court of Appeals. (ECF Nos. 20-34; 22-4; 23-19.)

11 **II. GOVERNING STANDARDS OF REVIEW**

12 **A. Antiterrorism and Effective Death Penalty Act (“AEDPA”)**

13 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus
 14 cases under AEDPA:

15 An application for a writ of habeas corpus on behalf of a person in custody pursuant
 16 to the judgment of a State court shall not be granted with respect to any claim that
 17 was adjudicated on the merits in State court proceedings unless the adjudication of
 18 the claim –

- 18 (1) resulted in a decision that was contrary to, or involved an unreasonable application
 19 of, clearly established Federal law, as determined by the Supreme Court of the
 20 United States; or
- 19 (2) resulted in a decision that was based on an unreasonable determination of the facts
 20 in light of the evidence presented in the State court proceeding.

21 A state court decision is contrary to clearly established Supreme Court precedent, within the
 22 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law
 23 set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are

1 materially indistinguishable from a decision of [the Supreme] Court.” Lockyer v. Andrade, 538
 2 U.S. 63, 73 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 405–06 (2000), and citing Bell v.
 3 Cone, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly
 4 established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if the state court
 5 identifies the correct governing legal principle from [the Supreme] Court’s decisions but
 6 unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 75 (quoting Williams,
 7 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state court decision to be
 8 more than incorrect or erroneous. The state court’s application of clearly established law must be
 9 objectively unreasonable.” Id. (quoting Williams, 529 U.S. at 409–10) (internal citation omitted).

10 The Supreme Court has instructed that “[a] state court’s determination that a claim lacks
 11 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
 12 correctness of the state court’s decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) (citing
 13 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The Supreme Court has stated “that even a
 14 strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” Id.
 15 at 102 (citing Lockyer, 538 U.S. at 75); see also Cullen v. Pinholster, 563 U.S. 170, 181 (2011)
 16 (describing the standard as a “difficult to meet” and “highly deferential standard for evaluating
 17 state-court rulings, which demands that state-court decisions be given the benefit of the doubt”
 18 (internal quotation marks and citations omitted)).

19 **B. Standard for effective-assistance-of-counsel claims**

20 In Strickland v. Washington, the Supreme Court propounded a two-prong test for analysis
 21 of claims of ineffective assistance of counsel requiring the petitioner to demonstrate (1) that the
 22 attorney’s “representation fell below an objective standard of reasonableness,” and (2) that the
 23 attorney’s deficient performance prejudiced the defendant such that “there is a reasonable

1 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
2 been different.” 466 U.S. 668, 688, 694 (1984). A court considering a claim of ineffective
3 assistance of counsel must apply a “strong presumption that counsel’s conduct falls within the
4 wide range of reasonable professional assistance.” Id. at 689. The petitioner’s burden is to show
5 “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed
6 the defendant by the Sixth Amendment.” Id. at 687. Additionally, to establish prejudice under
7 Strickland, it is not enough for the habeas petitioner “to show that the errors had some conceivable
8 effect on the outcome of the proceeding.” Id. at 693. Rather, the errors must be “so serious as to
9 deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687.

10 When the ineffective assistance of counsel claim is based on a challenge to a guilty plea,
11 the Strickland prejudice prong requires the petitioner to demonstrate “that there is a reasonable
12 probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted
13 on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Lafler v. Cooper, 566 U.S.
14 156, 163 (2012) (“In the context of pleas a defendant must show the outcome of the plea process
15 would have been different with competent advice.”).

16 Where a state district court previously adjudicated the claim of ineffective assistance of
17 counsel under Strickland, establishing that the decision was unreasonable is especially difficult.
18 See Richter, 562 U.S. at 104–05. In Richter, the United States Supreme Court clarified that
19 Strickland and § 2254(d) are each highly deferential, and when the two apply in tandem, review is
20 doubly so. Id. at 105; see also Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010) (internal
21 quotation marks omitted) (“When a federal court reviews a state court’s Strickland determination
22 under AEDPA, both AEDPA and Strickland’s deferential standards apply; hence, the Supreme
23 Court’s description of the standard as doubly deferential.”). The Supreme Court further clarified

1 that, “[w]hen § 2254(d) applies, the question is not whether counsel’s actions were reasonable.
 2 The question is whether there is any reasonable argument that counsel satisfied Strickland’s
 3 deferential standard.” Richter, 562 U.S. at 105.

4 **III. DISCUSSION**

5 **A. Grounds 1 and 2**

6 In ground 1, Wirth alleges that his counsel provided ineffective assistance in violation of
 7 the Fifth, Sixth, and Fourteenth Amendments because counsel failed to make him aware of the
 8 lifetime supervision consequence of his plea. (ECF No. 11 at 4.) Although not stated specifically
 9 in ground 1, Wirth argues generally that “there was a reasonable probability that he would have
 10 chosen to go to trial” but for his counsel’s unreasonable performance.⁵ (Id. at 3.) Relatedly, in
 11 ground 2, Wirth alleges that his was deprived due process in violation of the Fifth and Fourteenth
 12 Amendments because the state district court erred in denying his motion to withdraw his plea after
 13 he became aware of the impact of lifetime supervision following his plea. (Id. at 6.)

14 **1. Background information**

15 At the change of plea hearing, after the state district court canvassed Wirth, the prosecutor
 16 stated: “One thing that’s not in the Memorandum of Plea Negotiation that has to be addressed . . .
 17 was he needs to understand that he is going to have to register as a sex offender and that he may
 18 in fact be subject to lifetime supervision.” (ECF No. 19-27 at 15.) The state district court asked
 19 Wirth if he understood that, and Wirth replied, “Yes, ma’am.” (Id.) This was the extent of
 20 discussion about lifetime supervision at Wirth’s change of plea hearing.

21
 22
 23 ⁵ Similarly, in his motion to withdraw his guilty plea, Wirth stated that he “would not have entered
 this plea had he been told in advance that he would be sentenced to lifetime supervision.” (ECF
 No. 19-31 at 7.)

1 Following Wirth's motion to withdraw his guilty plea, counsel stated in an affidavit that
2 "[t]he subject of . . . lifetime supervision was thoroughly discussed and explained to Mr. Wirth on
3 numerous occasions, both in Court and in our office at meetings we had." (ECF No. 20-2 at 3.)
4 Counsel "specifically discussed offers and pleas in an effort to avoid triggering the . . . supervision
5 requirements." (Id.) Shortly after signing the affidavit, counsel testified at a hearing on Wirth's
6 motion to withdraw his guilty plea. Counsel testified that in discussing negotiations, "one of
7 [Wirth's] primary concerns almost above potential jail time was the idea that he would potentially
8 have to register as a sex offender so [they] talked about that on multiple occasions." (ECF No. 20-
9 3 at 23.) Counsel also testified that although he did not believe he "discussed any certain
10 conditions" regarding lifetime supervision because he "leave[s] that up to" parole and probation,
11 he "explained to [Wirth] there are certainly different tiers of registration and also supervision" and
12 "talked about some of the basic . . . requirements, staying away from schools, that sort of thing."
13 (Id. at 24, 27.) As such, counsel testified that he and Wirth "knew that the charges to which he
14 pled guilty to were going to be subject to lifetime supervision." (Id. at 27.)

15 The state district court denied Wirth's motion to withdraw his plea, explaining that it
16 believed Wirth "was aware that he would be subject to lifetime supervision as a sex offender."
17 (ECF No. 20-3 at 32–33.) The state district court noted that this determination was based on Wirth
18 affirmatively answering the state district court's question regarding his understanding of the
19 lifetime supervision provision at his change of plea hearing, counsel's affidavit that explained that
20 he discussed the lifetime supervision provision with Wirth, and counsel's testimony that he
21 discussed the lifetime supervision provision with Wirth. (Id. at 33.)

22 2. History of Nevada's Lifetime Supervision law

23

1 Nevada began imposing a special sentence of lifetime supervision on certain offenders in
2 1995. See Palmer v. State, 59 P.3d 1192, 1194 (Nev. 2002) (“Lifetime supervision is a mandatory
3 special sentence imposed upon all offenders who have committed sexual offenses after September
4 30, 1995.”). Pursuant to Nev. Rev. Stat. § 176.0931(1), “[i]f a defendant is convicted of a sexual
5 offense, the court shall include in sentencing, in addition to any other penalties provided by law, a
6 special sentence of lifetime supervision.” This special sentence “commences after any period of
7 probation or any term of imprisonment and any period of release on parole.” Nev. Rev. Stat. §
8 176.0931(2). Upon a sex offender’s release from parole, the State Board of Parole Commissioners
9 “will schedule a hearing to establish the conditions of lifetime supervision.” Nev. Admin. Code §
10 213.290(3).

11 Prior to 2007, Nev. Rev. Stat. § 213.1243—the statute governing the conditions of lifetime
12 supervision—simply provided that “[t]he board shall establish by regulation a program of lifetime
13 supervision of sex offenders to commence after any period of probation or any term of
14 imprisonment and any period of release on parole. The program must provide for the lifetime
15 supervision of sex offenders by parole and probation officers.” 1997 Nevada Laws, ch. 203, § 7
16 (S.B. 359); 1997 Nevada Laws, ch. 314, § 14 (S.B. 133). Thus, instead of listing any specific
17 conditions of supervision, Nev. Rev. Stat. § 213.1243 delegated the authority to design the lifetime
18 supervision program to the Parole Board.

19 Nev. Rev. Stat. § 213.1243 was amended in 2007, 2009, and 2019. In 2007, Nev. Rev. Stat.
20 § 213.1243 was amended to add that “the Board shall require as a condition of lifetime supervision
21 that the sex offender reside at a location only if” the following conditions were met: (a) “[t]he
22 residence has been approved by the parole and probation officer assigned to the person,” (b) “[i]f
23 the residence is a facility that houses more than three persons who have been released from prison,

the facility for transitional living for released offenders that is licensed pursuant to chapter 449 of NRS,” and (c) “[t]he person keeps the parole and probation officer informed of his current address.” 2007 Nevada Laws, ch. 418, § 5 (S.B. 354). In 2007, Nev. Rev. Stat. § 213.1243 was also amended to add that that “the Board shall require as a condition of lifetime supervision that the sex offender . . . not knowingly be within 500 feet of any place . . . that is designed primarily for use by or for children” if the sex offender “is a Tier 3 offender.” 2007 Nevada Laws, ch. 528, § 8 (S.B. 471). A Tier-3 offender “is a sex offender [who] is convicted of a sexual offense . . . against a child under the age of 14 years.” Id. The amendment also required the Board to “require as a condition of lifetime supervision” that a Tier-3 offender:

- (a) Reside at a location only if the residence is not located within 1,000 feet of any place, or if the place is a structure, within 1,000 feet of the actual structure, that is designed primarily for use by or for children, including, without limitation, a public or private school, a school bus stop, a center or facility that provides day care services, a video arcade, an amusement park, a playground, a park, an athletic field or a facility for youth sports, or a motion picture theater.
- (b) As deemed appropriate by the Chief, be placed under a system of active electronic monitoring that is capable of identifying his location and producing, upon request, reports or records of his presence near or within a crime scene or prohibited area or his departure from a specified geographic location.
- (c) Pay any costs associated with his participation under the system of active electronic monitoring, to the extent of his ability to pay.

Id. However, these 2007 amendment also provided that “[t]he Board is not required to impose” these conditions “if the Board finds that extraordinary circumstances are present and the Board states those extraordinary circumstances in writing.” Id. And in 2009, Nev. Rev. Stat. § 213.1243 was amended to add that “[t]he Board shall require as a condition of lifetime supervision that the sex offender not have contact or communicate with a victim of the sexual offense or a witness who testified against the sex offender.” 2009 Nevada Laws, ch. 300, § 2 (A.B. 325).

1 In 2016, in response to the Board imposing conditions not enumerated in Nev. Rev. Stat. §
 2 213.1243 on lifetime supervision offenders, the Nevada Supreme Court ruled that the Parole Board
 3 could not impose conditions beyond those listed in Nev. Rev. Stat. § 213.1243. McNeill v. State,
 4 132 Nev. 551, 555, 375 P.3d 1022, 1025 (2016).

5 In 2019, Nev. Rev. Stat. § 213.1243 was amended to add that the Board shall require as a
 6 condition of lifetime supervision that the offender:

- 7 (a) Participate in and complete a program of professional counseling approved
 8 by the Division, unless, before commencing a program of lifetime
 9 supervision, the sex offender previously completed a program of
 10 professional counseling recommended or ordered by the Board or the court
 11 upon conviction of the sexual offense for which the sex offender will be
 12 placed under a program of lifetime supervision.
- 13 (b) Not use aliases or fictitious names.
- 14 (c) Not possess any sexually explicit materials that is harmful to minors as
 15 defined in NRS 201.257.
- 16 (d) Not enter, visit or patronize an establishment which offers a sexually related
 17 form of entertainment as its primary business.
- 18 (e) Inform the parole and probation officer assigned to the sex offender of any
 19 post office box used by the sex offender.

20 2019 Nevada Laws, ch. 386, § 1 (S.B. 8). In 2019, Nev. Rev. Stat. § 213.1243 was also amended
 21 to add that “[i]f the sex offender is convicted of a sexual offense involving the use of the Internet,
 22 the Board shall require, in addition to any other condition imposed pursuant to this section, that
 23 the sex offender not possess any electronic device capable of accessing the Internet and not access
 the Internet through any such device or any other means.” Id. There are certain exceptions to this
 condition. In 2019, Nev. Rev. Stat. § 213.1243 was also amended to add that “[i]f the sex offender
 is convicted of a sexual offense involving the use of alcohol, marijuana or a controlled substance,
 the Board shall require . . . that the sex offender participate in an complete a program of counseling
 pertaining to substance abuse.” Id.

3. State court determination

1 In affirming Wirth's judgment of conviction, the Nevada Supreme Court held:

2 Appellant Charles Wirth argues that the district court erred by denying his
3 presentence motion to withdraw his guilty plea because he was not sufficiently
4 informed that he would be subject to lifetime supervision. We disagree. A guilty
5 plea is presumptively valid, and a defendant carries the burden of establishing that
6 the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268,
7 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877
8 P.2d 519, 521 (1994). This court will not reverse a district court's determination
concerning the validity of a plea absent a clear abuse of discretion. Hubbard, 110
Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court
looks to the totality of the circumstances to determine if the defendant understood
the consequences of the plea. State v. Freese, 116 Nev. 1097, 1105 [sic] 13 P.3d
442, 448 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

9 Here, the district court heard testimony from counsel that he explained to
10 Wirth, on numerous occasions, that lifetime supervision would be a result of
11 pleading guilty and that Wirth was aware that it would be required. Although
12 counsel spoke generally, and without regard to the specific conditions Wirth would
13 be subjected to, the conditions of lifetime supervision applicable to a specific
14 individual are not generally determination until shortly before release and therefore
15 all that is constitutionally required is that the appellant was aware that he would be
16 subject to the consequences of lifetime supervision before entry of the plea. Palmer
v. State, 118 Nev. 823, 830-31, 59 P.3d 1192, 1197 (2002). The plea canvass also
demonstrates that Wirth was aware that lifetime supervision would result. We
thereby conclude that the district court did not abuse its discretion in denying
Wirth's motion to withdraw his guilty plea. Crawford v. State, 117 Nev. 718, 721,
30 P.3d 1123, 1125 (2001) ("When reviewing a district court's denial of a motion
to withdraw a guilty plea, this court presumes that the district court properly
assessed the plea's validity, and we will not reverse the lower court's determination
absent abuse of discretion.").

17 (ECF No. 20-18 at 2–3.)

18 **4. Analysis**

19 This court previously determined that, although not presented as an independent
20 constitutional claim on direct appeal, the Nevada Supreme Court had an opportunity to act on the
21 constitutional claim for ineffective assistance of counsel stated in ground 1, thereby exhausting it
22 for federal habeas purposes. (ECF No. 44 at 5–6.) Because the Nevada Supreme Court did not
23 address the merits of Wirth's ineffective-assistance-of-trial-counsel claim, this court reviews

1 ground 1 de novo. See Cone v. Bell, 556 U.S. 449, 472 (2009); Porter v. McCollum, 558 U.S. 30,
2 39 (2009).

3 Wirth fails to support his assertion that counsel failed to advise him generally about the
4 lifetime supervision consequences of his plea with any evidence beyond his self-serving
5 statements. See, e.g., Womack v. Del Papa, 497 F.3d 998, 1004 (9th Cir. 2007) (rejecting an
6 ineffective-assistance-of-trial-counsel claim, in part, because “[o]ther than [the petitioner]’s own
7 self-serving statement, there [was] no evidence that his attorney” acted the way the petitioner
8 alleged). Rather, counsel affirmed in his affidavit and testified that he advised Wirth about lifetime
9 supervision. And, importantly, Wirth stated he understood that he may be subject to lifetime
10 supervision at this change of plea hearing.

11 Moreover, to the extent that Wirth argues that counsel failed to advise him about the
12 specific onerous conditions of lifetime supervision, Wirth’s conditions of lifetime supervision will
13 not be determined until he is released from parole. As the history of Nev. Rev. Stat. § 213.1243
14 demonstrates, there have been numerous conditions added between 2011—when Wirth entered his
15 plea—and the present time. In fact, more conditions could potentially be added to the statute before
16 Wirth’s release on parole and commencement of lifetime supervision. And importantly, up until
17 2016 when McNeill was decided, the Board was apparently regularly imposing nonenumerated
18 conditions upon lifetime supervision offenders. As such, because it appears that pretty much any
19 conditions were possible regardless of the statute pre-McNeill, counsel was not unreasonable in
20 testifying that in 2011 he did not discuss certain conditions of lifetime supervision other than the
21 basic requirements with Wirth because he leaves those conditions up to parole and probation.
22 Consequently, Wirth fails to demonstrate that counsel’s “representation fell below an objective
23 standard of reasonableness.” Strickland, 466 U.S. at 688; cf. Risher v. United States, 992 F.2d 982,

1 983 (9th Cir. 1993) (“[C]ounsel’s failure to warn [the defendant] before he entered his guilty plea
2 of the risk[s he faced at sentencing] fell below the level of professional competence required by
3 Strickland.”).

4 Furthermore, regarding prejudice, Wirth states generally that “he would have chosen to go
5 to trial” but for his counsel’s deficient performance. (ECF No. 11 at 3.) However, there is no
6 showing of any reasonable probability that, had Wirth known more about lifetime supervision, he
7 would not have pled guilty. Indeed, if Wirth had chosen to go to trial, he would have faced being
8 convicted of two counts of sexual assault of a child under the age of 14, attempted sexual assault
9 of a child under the age of 14, and four counts of lewdness with a child under the age of 14. (ECF
10 No. 18-14.) Instead, Wirth was able to significantly limit his exposure to both time in prison⁶ and
11 more onerous lifetime supervision conditions by pleading guilty pursuant to Alford. Wirth was
12 convicted of two counts of open or gross lewdness—the first of which was only a gross
13 misdemeanor—and one count of attempted sexual assault. Because these convictions were not
14 charged in the amended information as being against a child under the age of 14, Wirth will
15 apparently not be considered a Tier-3 sex offender at the time his lifetime supervision conditions
16 are imposed—a fact that was not assured had he chosen to go to trial and been found guilty of the
17 charges in the original information. Based on these facts, it appears inconceivable that any of the
18 remaining possible terms of lifetime supervision were a deciding factor driving Wirth’s decision
19 to plead guilty.

22 ⁶ Wirth faced imprisonment for 35 years to life for each of the charges for sexual assault of a child
23 under the age of 14, 2 to 20 years for the charge of attempted sexual assault of a child under the
age of 14, and 10 years to life for each of the four charges of lewdness with a child under the age
of 14. Nev. Rev. Stat. § 200.366(3)(c), § 193.153(1)(a)(1), § 201.230(2).

1 Additionally, Wirth fails to articulate any specific lifetime supervision conditions that *may*
 2 be imposed by the Board when he is released from parole that he finds especially intrusive.
 3 Although this Court does not disagree that lifetime supervision “is sufficiently onerous to
 4 constitute a form [of] punishment,” Palmer, 59 P.3d at 1196, it appears that the conditions that
 5 may be imposed against Wirth only amount to standard-type parole conditions:⁷ need to have his
 6 residence approved, need to keep his officer informed of his address, not to contact the victim,
 7 participate in counseling, not use fictitious names, not possess sexually explicit material that is
 8 harmful to minors, not patronize a sexually related form of entertainment, and inform his officer
 9 about any post office box he uses. Therefore, Wirth fails to demonstrate “that there is a reasonable
 10 probability that, but for counsel’s [alleged] errors, he would not have pleaded guilty and would
 11 have insisted on going to trial.” Hill, 474 U.S. at 59.

12 Wirth is not entitled to federal habeas relief for ground 1.

13 Turning to Wirth’s claim that the state district court erred in denying his motion to
 14 withdraw his plea, there is no Supreme Court case recognizing a constitutional right to withdraw
 15 a guilty plea.⁸ See Carey v. Musladin, 549 U.S. 70, 77 (2006) (“Given the lack of holdings from
 16 this Court regarding the [issue presented] here, it cannot be said that the state court ‘unreasonabl[y]
 17 appli[ed] clearly established Federal law.’” (quoting 28 U.S.C. § 2254(d)(1))). There is Supreme
 18 Court precedent, however, recognizing a right under the Due Process Clause to have one’s guilty
 19

20 ⁷ See, e.g., Munoz v. Smith, 17 F.4th 1237, 1238–39 (9th Cir. 2021) (finding that the following
 21 lifetime supervision conditions did “not severely and immediately restrain the petitioner’s physical
 22 liberty”: a monthly fee, electronic monitoring, and a requirement that the petitioner may only
 23 reside at a location if it has been approved and he keeps the officer informed of his current address).

⁸ And to the extent ground 2 challenges the state district court’s exercise of discretion under Nevada law, the claim is not cognizable as a federal habeas claim. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (“[A] state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus.”).

1 plea be both knowing, intelligent, and voluntary. See Brady v. United States, 397 U.S. 742, 748
2 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969). “Waivers of constitutional rights not only
3 must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the
4 relevant circumstances and likely consequences.” Brady, 397 U.S. at 748. “[A]lthough a defendant
5 is entitled to be informed of the direct consequences of the plea, the court need not advise him of
6 all the possible collateral consequences.” Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988)
7 (internal quotation marks omitted); see also United States v. Delgado-Ramos, 635 F.3d 1237, 1239
8 (9th Cir. 2011). “The distinction between a direct and collateral consequence of a plea turns on
9 whether the result represents a definite, immediate and largely automatic effect on the range of the
10 defendant’s punishment.” Torrey, 842 F.2d at 236 (internal quotation marks omitted). “In many
11 cases, the determination that a particular consequence is ‘collateral’ has rested on the fact that it
12 was in the hands of another government agency or in the hands of the defendant himself.” Id.

13 To begin, lifetime supervision is “deemed a form of parole,” Nev. Rev. Stat. § 213.1243(2),
14 and the Supreme Court has never clearly established that a parole term is a direct consequences of
15 a guilty plea of which a defendant must be advised. See Hill v. Lockhart, 474 U.S. 52, 56 (1985)
16 (“We have never held that the United States Constitution requires the State to furnish a defendant
17 with information about parole eligibility in order for the defendant’s plea of guilty to be
18 voluntary.”); United States v. Timmreck, 441 U.S. 780, 783–84 (1979) (finding that a violation of
19 Rule 11 of the Federal Rules of Criminal Procedure, which requires a district court to advise
20 defendants of a parole term, was “neither constitutional nor jurisdictional”); cf. Lane v. Williams,
21 455 U.S. 624, 630 (1982) (assuming without deciding, that the failure to advise a defendant of a
22 mandatory parole term would render a guilty plea constitutionally invalid). While the Ninth Circuit
23 has held that mandatory parole terms are direct consequences of a guilty plea and that defendants

1 must be informed of those terms before pleading guilty, Carter v. McCarthy, 806 F.2d 1373, 1376
2 (9th Cir. 1986), habeas relief is not available based merely upon a failure to follow Ninth Circuit
3 law.

4 Even if this Court analyzes Wirth's claim under Carter, Wirth cannot prevail. Counsel
5 attested and testified that he advised Wirth about the lifetime supervision consequence generally.
6 Thus, Wirth's argument that he was not fully aware that he would be subject to lifetime supervision
7 generally as a result of his plea is belied by the record. Further, Wirth stated he understood that he
8 may be subject to lifetime supervision at his change of plea hearing. See Blackledge v. Allison,
9 431 U.S. 63, 74 (1977) (addressing the evidentiary weight of the record of a plea proceeding when
10 the plea is subsequently subject to a collateral challenge and stating that (1) the defendant's
11 representations "constitute a formidable barrier in any subsequent collateral proceedings," and (2)
12 "[s]olemn declarations in open court carry a strong presumption of verity"); see also Muth v.
13 Fondren, 676 F.3d 815, 821 (9th Cir. 2012) ("Petitioner's statements at the plea colloquy carry a
14 strong presumption of truth.").

15 Furthermore, to the extent that Wirth argues that his plea was not intelligent because he
16 was not given notice of the specific conditions of lifetime supervision, those specific conditions of
17 lifetime supervision have yet to be determined by the Board and imposed. As such, the specific
18 conditions of Wirth's lifetime supervision are not definite or immediate and rest at the hands of
19 another governmental agency, making them merely collateral consequences of his plea. Torrey,
20 842 F.2d at 235–36. The state district court was not required to advise Wirth of possible collateral
21 consequences. Id.

22 Accordingly, the Nevada Supreme Court's determination that, after considering all the
23 relevant circumstances surrounding Wirth's plea, Wirth failed to demonstrate that his Alford plea

1 was invalid was neither contrary to, nor an unreasonable application of, clearly established federal
2 law and was not based on an unreasonable determination of the facts. Wirth is not entitled to federal
3 habeas relief for ground 2.

4 **B. Ground 3**

5 In ground 3, Wirth alleges that his counsel provided ineffective assistance in violation of
6 the Fifth, Sixth, and Fourteenth Amendments because counsel failed to retain an investigator to
7 investigate the Petrocelli witnesses to present a better defense at the Petrocelli hearing, failed to
8 hire an expert who could have reviewed the victim's medical records, and failed to move to
9 suppress the victim's diary. (ECF No. 11 at 10–21.) This court divides this ground into three
10 subparts: ground 3(a), ground 3(b), and ground 3(c).

11 **1. Ground 3(a)—investigator for Petrocelli witnesses**

12 **a. Background information**

13 A Petrocelli hearing was held before Wirth's trial was scheduled to start, and several
14 witnesses testified. (See ECF No. 19-24.) First, S.D. testified that she was friends with S.P. when
15 she was around seven years old in 2001 or 2002 and once, while she was at S.P.'s residence, Wirth
16 "started tickling [her] thigh and moved up [her] shorts and . . . touched [her] girl parts." (Id. at 6,
17 8–9.) Second, Donna Tichgelaar, Wirth's ex-wife, testified that around 1994 or 1995 one of her
18 daughters told her that Wirth "had been raping her," and when Tichgelaar confronted Wirth, he
19 admitted the molestation. (Id. at 21–24, 59.) Third, H.O., Tichgelaar's daughter, testified that
20 Wirth first raped her when she was eleven or twelve years old and then raped her "[j]ust about"
21 daily for approximately two years. (Id. at 64, 66–67.) H.O. got pregnant and had an abortion at the
22 age of fourteen and believed Wirth was the father of the child. (Id. at 86.) Fourth, Tichgelaar's
23 other daughter, J.O., testified that, when she was eight years old, Wirth "used to call [her] in the

1 bedroom and pull [her] pants down and check [her] private areas.” (Id. at 99, 102–03.) When J.O.
2 got older, Wirth, on “[t]wenty or more” occasions, performed oral sex on J.O., made her “fondle
3 him,” made her “perform oral sex with him,” and penetrated her with a sex toy. (Id. at 103–04,
4 106.) And on one occasion, Wirth attempted to have sexual intercourse with J.O. (Id. at 104–05.)

5 The state district court allowed S.D.’s testimony, excluded Tichgelaar’s testimony, and
6 limited H.O.’s testimony “to the incidents of sexual penetration” and J.O.’s testimony “to the
7 specific incidents that she testified to in the bedroom, the den, and the kitchen.” (ECF No. 19-25
8 at 3–6.) Wirth’s counsel testified at the post-conviction evidentiary hearing that no investigation
9 was conducted into the allegations made by the witnesses presented at the Petrocelli hearing. (ECF
10 No. 22 at 21–23.)

11 **b. State court determination**

12 In affirming the denial of Wirth’s state post-conviction petition, the Nevada Court of
13 Appeals held:

14 Wirth claims counsel was ineffective for failing to hire an investigator to
15 interview witnesses prior to them testifying at the Petrocelli hearing. The district
16 court concluded Wirth failed to demonstrate counsel was deficient or resulting
17 prejudice. We conclude the district court’s decision is supported by substantial
18 evidence because Wirth failed to support his claim with specific facts that, if true,
19 would entitle him to relief. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d
20 222, 225 (1984). He failed to allege what evidence the witnesses would have
provided to an investigator had the investigator been hired. Wirth also failed to
demonstrate a reasonable probability he would not have pleaded guilty had counsel
hired an investigator. Therefore, the district court did not err in denying this claim.

(ECF No. 23-19 at 3 (internal footnote omitted).)

21 **c. Analysis**

22 Defense counsel has a “duty to make reasonable investigations or to make a reasonable
23 decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691. It is

undisputed that Wirth’s counsel did not hire an investigator to investigate the Petrocelli witnesses. Counsel was not asked why he made the decision that an investigator was not needed, so it is debatable whether this decision was reasonable under Strickland.⁹ Regardless, Wirth fails to demonstrate a reasonable probability that, but for not hiring an investigator to investigate the Petrocelli witnesses, he would not have pleaded guilty. Hill, 474 U.S. at 59. Indeed, it is mere speculation that hiring an investigator would have uncovered rebuttal witnesses or produced fruitful impeachment material which would have changed the state district court’s ruling allowing the damaging testimony of S.D., H.O., and J.O. to be presented at trial, thereby inducing Wirth’s change of plea. See Djerf v. Ryan, 931 F.3d 870, 881 (9th Cir. 2019) (“Strickland prejudice is not established by mere speculation.”). Therefore, the Nevada Court of Appeals’ determination that substantial evidence supported the state district court’s decision regarding prejudice constitutes an objectively reasonable application of Strickland’s prejudice prong. 466 U.S. at 688; see also Hill, 474 U.S. at 59. Wirth is not entitled to federal habeas relief for ground 3(a).

2. Ground 3(b)—failure to retain an expert

a. Background information

Wirth’s Counsel moved for a psychological evaluation of S.P., and the state district court granted the motion. (ECF Nos. 18-17; 18-20.) Counsel then noticed Dr. Mark Chambers as an expert witness, noting that Dr. Chambers would “testify to the psychological examination of the victim, and the submission of his evaluation.” (ECF No. 18-23.) Dr. Chambers’ evaluation of S.P. provided, inter alia, that: (1) S.P. had “a long history of behavior and anger control problems that would appear to predate the earliest alleged episode of sexual abuse,” (2) there “appear[ed] to be

⁹ Notably, H.O. and J.O. were subpoenaed for the Petrocelli hearing only a week before it took place. (ECF No. 19-24 at 98, 121.)

1 a consensus among those that kn[e]w [S.P.] that she ha[d] a reputation for often being less than
 2 truthful regarding various matters,” (3) “[r]egarding her allegations [against Wirth], testimony
 3 from individuals close to the family indicate[d] that she has recanted her allegations on several
 4 different occasions, each time explaining that she had accused her stepfather because she was
 5 ‘mad’ at him,” (4) “[t]he many inconsistencies in [S.P.’s] accounts of the alleged sexual abuse by
 6 the defendant . . . raise questions about her veracity,” (5) until the preliminary hearing S.P. never
 7 mentioned in any police statement, her diary, her sexual assault exam, or her pediatric assessment
 8 that Wirth “penetrated her vagina with his penis,” and (6) S.P.’s “behavioral history strongly
 9 suggest[ed] a diagnosis of conduct disorder.” (ECF No. 18-31 at 32–35.) During a pre-trial hearing,
 10 counsel stated that Dr. Chambers was “pretty much the basis of [the] defense.”¹⁰ (ECF No. 19-7
 11 at 11–12.)

12 Counsel also noticed (1) Dr. Michelle Stacey,¹¹ noting that “Dr. Stacey will provide
 13 medical documentation of the victim’s allegations of the purported incidents that did not occur,”
 14 (2) the custodian of records at Sunrise Hospital and Medical Center, noting that “[d]ocumentation
 15 from medical records of the victim will be provided so [sic] show that there was no evidence of
 16 any sexual abuse,” and (3) the custodian of records at Specialty Medical Center II, noting that
 17 “[t]he Custodian of Records will provide medical records of the victim.” (ECF No. 18-24 at 6–7.)

18 **b. State court determination**

19 In affirming the denial of Wirth’s state post-conviction petition, the Nevada Court of
 20 Appeals held:

21 ¹⁰ Following a motion by the State to exclude Dr. Chambers’ testimony, the state district court
 22 ruled “that there [were] a number of things in that report that are impermissible that he cannot
 23 testify to.” (ECF No. 19-19 at 34.)

¹¹ The State also noticed Dr. Stacey as a witness, explaining that Dr. Stacey would “testify to the
 level of care given to the victim.” (ECF No. 18-27 at 3.)

Wirth claims counsel was ineffective for failing to retain an expert regarding the victim's medical records. The district court concluded Wirth failed to demonstrate counsel was deficient or resulting prejudice. We conclude substantial evidence supports the decision of the district court because Wirth failed to support this claim with specific facts that, if true, would entitle him to relief. [Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).] He failed to allege what testimony an expert would have provided to refute the medical evidence that would have been presented by the State. Wirth also failed to demonstrate a reasonable probability he would not have pleaded guilty had counsel hired an expert. Therefore, the district court did not err in denying this claim.

(ECF No. 23-19 at 3.)

c. Analysis

“[S]trategic decisions—including whether to hire an expert—are entitled to a ‘strong presumption’ of reasonableness.” Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) (quoting Richter, 562 U.S. at 86). Here, Wirth’s allegation that his counsel should have retained an expert to review S.P.’s medical records fails to rebut this presumption because “the absence of evidence cannot overcome” the presumption. Id. Indeed, as the state district court noted at the post-conviction evidentiary hearing, there was nothing presented during the post-conviction proceedings demonstrating that S.P.’s medical records would have inculpated or exculpated Wirth. (See ECF No. 22 at 55.) This dearth of information regarding S.P.’s medical records and failure to demonstrate what evidence an expert would have provided thereby refute Wirth’s allegation that counsel was deficient.¹² Moreover, counsel retained Dr. Chambers as an expert to testify about S.P.’s psychological evaluation, which tended to support Wirth’s defense that S.P. was making up the allegations due to her hatred for Wirth. See Richter, 562 U.S. at 107 (“Counsel was entitled to

¹² And it appears that counsel was not concerned about S.P.’s medical records damaging Wirth’s defense because he noted on his witness list that a custodian of records from Sunrise Hospital and Medical Center would provide S.P.’s medical records to demonstrate that “there was no evidence of any sexual abuse.” (See ECF No. 18-24 at 6.)

1 formulate a strategy that was reasonable at the time and to balance limited resources in accord with
 2 effective trial tactics and strategies.”). Accordingly, the Nevada Court of Appeals’ determination
 3 that substantial evidence supported the state district court’s decision regarding a lack of deficiency
 4 on the part of counsel constitutes an objectively reasonable application of Strickland’s
 5 performance prong. 466 U.S. at 688. Wirth is not entitled to federal habeas relief for ground 3(b).

6 **3. Ground 3(c)—lack of suppression of the diary**

7 **a. Background information**

8 S.P.’s 9-page diary¹³ incriminated Wirth. (See ECF No. 19-20 at 4–8.) On August 21, 2008,
 9 Wirth’s counsel moved to compel discovery of S.P.’s “journals, papers and writings,” believing
 10 that these writings would show that she was angry “over the breakup of her parents [sic] marriage,
 11 and [was] acting-out by falsely blaming [Wirth].” (ECF No. 18-16 at 2–3.) At a hearing on the
 12 motion, counsel explained that the State “gave [the defense] one or two pages of her diary,” but
 13 the defense “want[ed] the whole diary.” (ECF No. 18-19 at 6.) The state district court agreed,
 14 stating “you should have access to anything that they have.” (Id.; see also ECF No. 18-21.) After
 15 the State provided the diary, counsel never moved to suppress it. (ECF No. 22 at 53.)

16 **b. State court determination**

17 In affirming the denial of Wirth’s state post-conviction petition, the Nevada Court of
 18 Appeals held:

19 Wirth claims counsel was ineffective for failing to file a motion to suppress
 20 the victim’s diary. The district court concluded Wirth failed to demonstrate counsel
 21 was deficient or resulting prejudice. We conclude substantial evidence supports the
 22 decision of the district court because Wirth failed to support this claim with specific
 facts that, if true, would entitle him to relief. [Hargrove v. State, 100 Nev. 498, 502-
 03, 686 P.2d 222, 225 (1984).] Further, Wirth failed to demonstrate a motion to
 suppress would have been successful, and counsel is not ineffective for failing to

23 ¹³ Although it was called a diary, it appears the 9-page writing was a letter from S.P. to her mother.
 (See ECF No. 19-20 at 4.)

1 file futile motions. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
2 (1978). Wirth also failed to demonstrate a reasonable probability he would not have
3 pleaded guilty had counsel filed a motion to suppress. Therefore, the district court
4 did not err in denying this claim.

(ECF No. 23-19 at 4.)

5 c. Analysis

6 During the state post-conviction evidentiary hearing, the state district court stated that it
7 did not “know whether the diary would have come in at trial or not” because “we never got there.”
8 (ECF No. 22 at 55.) Indeed, even though counsel never moved to suppress the diary before the
9 trial began, there is no showing that the defense would have been unable to contest the admission
10 of the diary if the State sought to admit it at trial. See Richter, 562 U.S. at 106 (“Rare are the
11 situations in which the wide latitude counsel must have in making tactical decisions will be limited
12 to any one technique or approach.”). Further, Wirth’s post-conviction counsel explained at the
13 post-conviction evidentiary hearing that the Petrocelli “hearing was the catalyst that caused him to
14 enter the plea.” (ECF No. 22 at 11.) As such, Wirth fails to support his allegation that he would
15 not have entered an Alford plea but for counsel’s failure to file a pre-trial motion to suppress the
16 diary. See Hill, 474 U.S. at 59. Thus, the Nevada Court of Appeals’ determination that substantial
17 evidence supported the state district court’s decision regarding a lack of deficiency on the part of
18 counsel and resulting prejudice constitutes an objectively reasonable application of Strickland’s
19 performance and prejudice prongs. 466 U.S. at 688; see also Hill, 474 U.S. at 59. Wirth is not
20 entitled to federal habeas relief for ground 3(c).

21 C. Ground 5

22
23

1 In the remaining portion¹⁴ of ground 5, Wirth alleges that he was denied due process and
2 equal protection in violation of the Fifth, Sixth, and Fourteenth Amendments because the justice
3 court lacked jurisdiction due to its failure to hold the requisite probable cause hearing on every
4 charge, the justice court abused its discretion in allowing the State to amend the complaint, the
5 information was filed more than 15 days after the preliminary hearing, and the state district court
6 lacked jurisdiction stemming from the justice court's lack of jurisdiction. (ECF No. 11 at 45–61.)

7 **1. Background information**

8 A criminal complaint was filed in the Justice Court of Pahrump Township on or about
9 August 27, 2007, charging Wirth with four counts of sexual assault and five counts of lewdness
10 with a child under the age of fourteen. (ECF No. 18-3.) A preliminary hearing was held on June
11 26, 2008. (ECF No. 18-12.) Following portions of S.P.'s preliminary hearing testimony, the State
12 moved to dismiss two counts, to amend one count from sexual assault to attempted sexual assault,
13 and to amend several counts to reflect a different date and/or different body part. (Id. at 20, 23–24,
14 28, 66–69.) Following S.P.'s testimony and the amendment of the criminal complaint, the justice
15 court found “that probable cause has been shown that crimes were committed, to-wit, Count I, II,
16 III, VI, VII, VIII, and IX of the criminal complaint, and that the defendant, Charles Matthew Wirth,
17 committed the same.” (Id. at 73.) Consequently, the justice court “order[ed] that [Wirth] be bound
18 over to the Fifth Judicial District Court.” (Id.) The justice court entered a “bindover order” on July
19 15, 2008. (ECF No. 18-13.) The State filed an information in state district court the same day.
20 (ECF No. 18-14.)

21 **2. Applicable state law**

22

23 ¹⁴ The following portion of ground 5 was previous dismissed: Wirth's counsel was ineffective for failing to challenge the state district court's jurisdiction because no probable cause hearing was conducted on each charge. (ECF No. 44 at 3.)

1 Nev. Rev. Stat. § 173.095(1) provides that “[t]he court may permit an indictment or
 2 information to be amended at any time before verdict or finding if no additional or different offense
 3 is charged and if substantial rights of the defendant are not prejudiced.” And Nev. Rev. Stat. §
 4 171.206 provides that “[i]f from the evidence it appears to the magistrate that there is probable
 5 cause to believe that an offense has been committed and that the defendant has committed it, the
 6 magistrate shall forthwith hold the defendant to answer in the district court; otherwise, the
 7 magistrate shall discharge the defendant.” And finally, Nev. Rev. Stat. § 173.035(3) provides that
 8 “[t]he information must be filed within 15 days after the holding or waiver of the preliminary
 9 examination.”

10 **3. State court determination**

11 In affirming the denial of Wirth’s motions to correct an illegal sentence, the Nevada Court
 12 of Appeals held:

13 In his motions, Wirth claimed the district court lacked jurisdiction to
 14 sentence him because there was no probable cause hearing and the State amended
 15 the attempted-sexual-assault charge after the preliminary hearing. Wirth further
 16 claimed his sentence for second offense open or gross lewdness was illegal because
 he did not have a first-offense open-or-gross-lewdness conviction. And Wirth
 argued the district court should grant his motions because they were unopposed by
 the State and should be construed as meritorious pursuant to D.C.R. 13(3).

17 A motion to correct an illegal sentence “presupposes a valid conviction”
 18 and may only challenge the facial legality of the sentence: either the district court
 19 was without jurisdiction to impose a sentence or the sentence was imposed in excess
 20 of the statutory maximum. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324
 (1996) (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)). A
 21 district court may summarily deny a motion to correct an illegal sentence if it raises
 22 issues that fall outside the very narrow scope of issues permissible in such motions.
 23 Id. at 708 n.2, 918 P.2d at 325 n.2.

Wirth’s claims fell outside the narrow scope of claims permissible in a
 motion to correct an illegal sentence because they did not implicate the jurisdiction
 of the district court, see Nev. Const. art. 6, § 6; NRS 171.010, and his sentences are
 facially legal, see NRS 193.130(2)(d); NRS 193.140; NRS 193.330(1)(a); NRS

200.366(3); NRS 201.210(1). Accordingly, the district court did not err by summarily denying his motions.

(ECF No. 24-31 at 2–3.)

4. Analysis

In Tollett v. Henderson, the Supreme Court stated:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the [constitutional] standards [established for effective assistance of counsel].

411 U.S. 258, 267 (1973). Accordingly, “while claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for federal collateral relief.” Id. Ninth Circuit law appears to confirm that the Tollett bar applies to Alford pleas. See Ortberg v. Moody, 961 F.2d 135, 137–38 (9th Cir. 1992). Because Wirth’s remaining claims in ground 5 concern events which preceded his Alford plea, they “are not themselves independent grounds for federal collateral relief.” Tollett, 411 U.S. at 267.

Further, ground 5 only concerns one apparent valid error of state law—the filing of the information 4 days late—which did not render Wirth’s proceedings fundamentally unfair.¹⁵ See Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (explaining that “[s]imple errors of state law do not warrant federal habeas relief”); Estelle v. McGuire, 502 U.S. 62, 70 (1991) (explaining that this court must only consider whether the errors were so prejudicial that it rendered

¹⁵ It appears that the State properly amended the complaint prior to the justice court’s probable cause determination in accordance with Nevada law. See Nev. Rev. Stat. § 173.095(1).

the proceedings fundamentally unfair as to violate due process); Jammal v. Van de Kamp, 926 F.2d 918, 919–20 (9th Cir. 1991) (“The issue for us, always, is whether the state proceedings satisfied due process; the presence or absence of a state law violation is largely beside the point.”).

Therefore, the Nevada Court of Appeals’ denial of Wirth’s claim was neither contrary to, nor an unreasonable application of, clearly established federal law and was not based on an unreasonable determination of the facts. Wirth is not entitled to federal habeas relief for ground 5.

D. Ground 16

In ground 16, Wirth alleges that he was denied due process and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments due to the cumulative errors of his counsel.¹⁶ (ECF No. 11-1 at 81–83.) Cumulative error applies where, “although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.” United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); see also Parle v. Runnels, 387 F.3d 1030, 1045 (9th Cir. 2004) (explaining that the court must assess whether the aggregated errors “so infected the trial with unfairness as to make the resulting conviction a denial of due process” (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974))). This court has not identified any definite errors on the part of Wirth’s counsel, so there are no errors to cumulate. Wirth is not entitled to federal habeas relief for ground 16.¹⁷

V. CERTIFICATE OF APPEALABILITY

¹⁶ This court only considers Wirth’s remaining ineffective-assistance-of-trial-counsel claims in ground 16. (See ECF No. 44 at 7.)

¹⁷ Wirth requests that this court conduct an evidentiary hearing. (ECF No. 11 at 1.) Wirth fails to explain what evidence would be presented at an evidentiary hearing. Furthermore, this court has already determined that Wirth is not entitled to relief, and neither further factual development nor any evidence that may be proffered at an evidentiary hearing would affect this court’s reasons for denying relief. Wirth’s request for an evidentiary hearing is denied.

1 This is a final order adverse to Wirth. Rule 11 of the Rules Governing Section 2254 Cases
2 requires this court issue or deny a certificate of appealability (COA). As such, this court has *sua*
3 *sponte* evaluated the remaining claims within the petition for suitability for the issuance of a COA.
4 See 28 U.S.C. § 2253(c); Turner v. Calderon, 281 F.3d 851, 864–65 (9th Cir. 2002). Pursuant to
5 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has made a substantial
6 showing of the denial of a constitutional right.” With respect to claims rejected on the merits, a
7 petitioner “must demonstrate that reasonable jurists would find the district court’s assessment of
8 the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citing
9 Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). For procedural rulings, a COA will issue only
10 if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a
11 constitutional right and (2) whether this court’s procedural ruling was correct. Id.

12 Applying these standards, this court finds that a certificate of appealability is unwarranted.

13 **VI. CONCLUSION**

14 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus pursuant to
15 28 U.S.C. § 2254 (ECF No. 11) is DENIED.

16 IT IS FURTHER ORDERED that Petitioner is denied a certificate of appealability.

17 IT IS FURTHER ORDERED that the Clerk of the Court is to enter judgment accordingly
18 and close this case.

19 Dated: November 30, 2022



RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE